Ho Tze Kean v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS S-05(M)-225–06 OF 2016 AND S-05(LB)-179–05 OF 2017
DAVID WONG, HAMID SULTAN AND KAMARDIN HASHIM JJCA
8 JANUARY 2018

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person convicted with two charges of drug-trafficking — Sentenced to death — Drugs found in car driven by accused person — Whether accused person had knowledge of drugs — Whether innocent carrier of ignorant simpliciter — Whether accused person admitted to drugs during arrest — Whether cautioned statement properly exercised — Whether defence probable — Dangerous Drugs Act 1952 s 39B(1)(a)

Acting upon information received that a certain drug-trafficking activity would take place, a police team led by PW7 proceeded to the said location. A black car ('the Kancil') came in 25 minutes later and the police rushed to the car arrested the appellant ('the accused'). According to PW7, the accused uttered the words 'Ada Syabu di dalam plastik krim di sebelah kerusi bahagian penumpang'. The police found a plastic bag which contained two packets of crystallised substances. The accused's arrest led to the latter's house where seven more packets of the same substances were found. The substances found in the car and the house were later confirmed by the chemist to be 124.04g and 215.6g of methamphetamine, respectively. The accused was charged at the High Court for two offences of trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the prosecution's case, the accused was acquitted and discharged for the second charge. However, he was ordered to enter his defence on the first charge. In his defence, the accused denied knowledge of the presence of the drugs. The accused submitted that: (a) he was about to deliver a wallet to one Aloysious who had purchased the same from the accused's wife; (b) the said wallet was wrapped and kept/placed inside the bag found in the car; and (c) he did not check the content of the plastic bag. The trial judge held that the defence of innocent carrier was not applicable to the accused as he had only shown that he was an ignorant simpliciter. The accused was convicted for the offence and sentenced to death. Hence, the present appeal. The issues that arose were: (i) whether the accused was under arrest when he uttered the words amounting to an admission of knowledge about the drugs in the Kancil; (ii) whether a statutory caution had been given to the accused; (iii) failure of the trial judge to consider the evidence of PW8 which corroborated the defence of the accused; and (iv) failure of the prosecution to call and produce the accused's wife.

Held, allowing appeal:

(1) The accused had been restrained and force was used to prevent him from driving away. The conducts by the raiding team clearly showed that the arrest occurred at that time. The trial judge misdirected in fact and in law when His Lordship made a finding that no arrest had been made at the time when the accused uttered the first statement to the effect that there was syabu inside his car. The trial judge erred when His Lordship relied on the first statement to fasten knowledge of the drugs to the accused. This error and misdirection occasioned a substantial miscarriage of justice to the accused which warranted an appellant intervention (see paras 22–23).

(2) There was no evidence that PW7 mentioned and explained the exact words of caution used under s 37 of the Act or words to the like effect to the accused in this case. The proper administration of the statutory caution was a prerequisite to the admissibility of any confession or an admission. The trial judge had fallen into error when His Lordship proceeded to consider and relied on the accused's admission to fasten element of knowledge. The prosecution had in fact withdrawn the admission by the accused as part of their evidence. This was overlooked by the trial judge (see paras 27–28 & 31)

(3) The trial judge did not at all consider the evidence of PW8, which supported the accused's defence. His Lordship commented that it was highly improbable that the accused's wife would have framed her husband. This was not the defence's version. The defence's version was that the accused was just helping the wife in her business. PW8's evidence was not challenged nor rebutted by the prosecution. However, this piece of evidence was not considered by the trial judge (see paras 35 & 37).

(4) The accused's wife was an important witness which formed part of the narrative of the prosecution's case. The efforts taken by the police were not sufficient to satisfy the pre-conditions provided under s 32(1) of the Evidence Act 1950 ('the EA'). The failure to call the accused's wife created a gap in the prosecution's case and amounted to a suppression of evidence hence attracting the invocation of an adverse inference under s 114(g) of the EA. Therefore, the conviction of the accused was not safe. The conviction and sentence of the High Court was set aside (see paras 40 & 42–44).

[Bahasa Malaysia summary

Bertindak berdasarkan maklumat yang diterima bahawa satu aktiviti pengedaran dadah akan dijalankan, sepasukan polis yang diketuai oleh PW7 terus ke lokasi yang dinyatakan. Sebuah kereta hitam ('Kancil tersebut') masuk 25 minit kemudian dan pihak polis bergegas menahan perayu ('tertuduh'). Menurut PW7, dia menyatakan perkataan-perkataan 'Ada syabu di dalam

plastik krim di sebelah kerusi bahagian penumpang'. Pihak polis menemui satu beg plastik yang mengandungi dua paket bahan serbuk. Penahanan tertuduh membawa ke rumahnya di mana tujuh lagi paket berisi bahan yang sama ditemui. Bahan-bahan yang dijumpai di dalam kereta dan rumahnya kemudian disahkan oleh ahli kimia sebagai, masing-masing 124.04g dan 215.6g methamphetamine. Tertuduh dipertuduh di Mahkamah Tinggi bagi dua kesalahan mengedar bawah s 39B(1)(a) Akta Dadah Berbahaya ('Akta'). Pada penutup kes pendakwaan, tertuduh dilepaskan dan dibebakan bagi pertuduhan kedua. Walau bagaimanapun, dia diperintah membela diri untuk pertuduhan pertama. Dalam pembelaannya, tertuduh menafikan pengetahuan tentang dadah-dadah tersebut. Tertuduh menghujahkan bahawa: (a) dia hendak menyerahkan dompet kepada seorang bernama Aloysious yang membeli dompet ini daripada isteri tertuduh; (b) dompet tersebut dibalut dan disimpan/diletakkan di dalam beg yang dijumpai di dalam kereta; dan (c) dia tidak memeriksa kandungan beg plastik tersebut. Hakim bicara memutuskan bahawa pembelaan pembawa tidak bersalah tidak terpakai pada perayu kerana dia hanya menunjukkan dia jahil semata-mata. Tertuduh disabitkan atas kesalahan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini. Isu-isu yang timbul adalah: (i) sama ada tertuduh di bawah tahanan semasa dia mengucapkan perkataan-perkataan yang terjumlah sebagai pengakuan pengetahuan tentang dadah di dalam Kancil tersebut; (ii) sama ada pernyataan beramaran telah diberi kepada tertuduh; (iii) kegagalan hakim bicara mempertimbangkan keterangan PW8 yang menyokong pembelaan tertuduh; dan (iv) kegagalan pihak pendakwaan memanggil dan mengemukakan isteri tertuduh.

Diputuskan, membenarkan rayuan:

(1) Tertuduh ditahan dan kekerasan digunakan untuk mengelakkan dia daripada memandu pergi. Tindakan pasukan serang hendap jelas menunjukkan bahawa tahanan berlaku pada masa itu. Hakim bicara tersalah arah secara fakta dan undang-undang apabila beliau memutuskan bahawa tiada penahanan dibuat pada masa tertuduh mengucapkan kenyataan pertama yang bermaksud terdapat syabu dalam keretanya. Hakim bicara terkhilaf apabila beliau bergantung pada kenyataan pertama untuk mengaitkan pengetahuan tentang dadah dengan tertuduh. Kekhilafan dan salah arahan ini menyebabkan ketidakadilan besar kepada perayu yang mewajarkan campur tangan rayuan (lihat perenggan 22–23).

(2) Tiada keterangan bahawa PW7 menyatakan dan menjelaskan perkataan-perkataan amarah yang digunakan dalam s 37 Akta atau perkataan-perkataan yang serupa dengannya kepada tertuduh dalam kes ini. Pentadbiran teratur pernyataan beramaran adalah pra-syarat kebolehterimaan apa-apa pengakuan. Hakim bicara terkhilaf apabila beliau terus mempertimbangkan dan bergantung pada pengakuan

tertuduh untuk mengaitkan elemen pengetahuan. Pihak pendakwaan sebenarnya telah menarik balik pengakuan tertuduh sebagai sebahagian keterangannya. Ini dilepas pandang oleh hakim bicara (lihat perenggan 27–28 & 31).

(3) Hakim bicara langsung tidak mempertimbangkan keterangan PW8 yang menyokong pembelaan tertuduh. Beliau memberi komen bahawa tidak mungkin isteri tertuduh akan menjerat suaminya. Ini bukan versi pembelaan. Versi pembelaan adalah bahawa perayu cuma membantu isterinya dalam perniagaannya. Keterangan PW8 tidak dicabar mahupun disangkal oleh pihak pendakwaan. Walau bagaimanapun, keterangan ini tidak dipertimbangkan oleh hakim bicara (lihat perenggan 35 & 37).

(4) Isteri tertuduh adalah saksi penting yang membentuk sebahagian naratif kes pendakwaan. Langkah-langkah yang diambil oeh pihak polis tidak cukup untuk memenuhi pra-syarat yang dinyatakan di bawah s 32(1) Akta Keterangan 1950 ('AK'). Kegagalan memanggil isteri tertuduh menghasilkan satu lompang dalam kes pendakwaan dan terjumlah sebagai penyembunyian keterangan maka membangkitkan bangkitan anggapan bertentangan di bawah s 114(g) AK. Oleh itu, sabitan tertuduh tidak selamat. Sabitan dan hukuman oleh Mahkamah Tinggi diketepikan (lihat perenggan 40 & 42–44).]

Notes

For cases on appeal against conviction and sentence, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 321–500.

Cases referred to

Francis Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306; [1982] CLJ 464; [1982] CLJ Rep 130, FC (refd)
John a/k Nyumbei v PP [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Lim Hock Boon [2009] 3 MLJ 604; [2009] 3 CLJ 430, FC (refd)

Legislation referred to

Criminal Procedure Code s 112
Dangerous Drugs Act 1952 ss 37(d), (da)(xvi), 39B(1)(a), 39B(2)
Evidence Act 1950 ss 32(1), 114(g)

Appeal from: Criminal Trial Nos SDK-45A-1/7 of 2014 and SDK-45A-2/8 of 2014 (High Court, Sandakan)

Nelson W Angang (Aklee, Chua & Angang) for the accused.
Jasmee Hameeza bt Jaafar (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] The accused was charged with two offences of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same Act.

[2] Particulars of the two charges were as follows:

> Case No SDK-45A-1/7-2014('first charge')
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> That you, on 15-11-2013 at about 3.00 pm, at the back side of Syarikat Victory Auto Parts, Hing Lee 1 Street, Mile 3, Sandakan, in the state of Sabah, did on your own behalf, trafficked in a dangerous drugs to wit 124.04 gram of Methamphetamine and that you have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under Section 39B(2) of the same Act.
>
> Case No SDK-45A-2/8-2014('second charge')
>
> That you, on 15-11-2013 at about 3.45 pm at Lorong E60, Jambatan E, Rumah Murah Sim-Sim, Sandakan, in the state of Sabah, did on your own behalf, trafficked in a dangerous drugs to wit 215.6 gram of Methamphetamine and that you have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under Section 39B(2) of the same Act.

[3] The accused was acquitted and discharged of the second charge by the learned trial judge at the end of the prosecution's case. Aggrieved, the public prosecutor appealed to this court against the acquittal. However, the learned trial judge ordered the accused to enter upon his defence on the first charge.

[4] At the end of the trial, the learned trial judge convicted the accused and sentenced him to suffer the mandatory death penalty on the first charge. Aggrieved by the conviction and sentence, the accused likewise appealed to this court.

[5] We heard both the appeals together on 25 September 2017. At the outset, the learned deputy public prosecutor ('the learned deputy') withdrew their appeal against the acquittal. We struck out the prosecution's appeal and we affirmed the acquittal of the accused on the second charge.

[6] After hearing the parties and after perusing the appeal records, we allowed the accused's appeal in respect of the first charge. We set aside the conviction and sentence imposed by the learned trial judge. We now give our grounds of doing so.

THE PROSECUTION'S CASE

[7] The prosecution's case may be summarised as follows:

(a) acting on an information received, on 15th day of November 2013 at about 1.30pm, Insp Wan Mohd Ismail bin Wan Aziz ('PW7') assembled a team of ten policemen and conducted a briefing regarding a drug trafficking activity behind the premises of Syarikat Victory Auto Part, Mile 3, Sandakan;

(b) during the briefing, PW7 divided his team into four teams with specific instruction given to each team. They proceeded to the said location and after waiting for about 25 minutes a black Kancil with registration No SS9200J ('the said Kancil') came and was parked behind Sykt Victory Auto Parts. There was only one man inside the car, later identified as the accused. The police team then rushed to the car and apprehended the accused;

(c) upon inspection the police found one plastic bag, cream in colour, placed in the front passenger seat of the said Kancil. PW7 then conducted further checks on the cream plastic bag (P12(1)) and found two black plastic packet inside it. Inside the two plastic packets, PW7 found four transparent plastic packets containing crystalised substance suspected to be methamphetamine;

(d) the accused was then arrested. Further investigation was carried out which led the police to the accused's house where seven transparent plastic packets containing crystallised substance suspected to be methamphetamine were found; and

(e) the crystallised substance found in the transparent plastic bag found in the said Kancil car was sent for analysis at Jabatan Kimia Kota Kinabalu and upon analysis by the chemist, Billing ak Peter Raig (PW3) confirmed that it was methamphetamine with pure weight of 124.04g.

[8] The learned trial judge accepted the evidence of PW3 on the drug analysis undertaken by the witness. There was no defect in PW3's analysis and there was no challenge by the defence on the identity of the drugs exhibits. The learned trial judge accepted the evidence of PW3 as to the type and weight of the drugs, the subject matter of the first charge.

[9] As for the element of possession, the learned trial judge held that the prosecution had proven the element of possession by way of direct evidence based on the fact that the accused was alone in the said Kancil car together with the impugned drugs found in the front passenger's seat of the said Kancil car. Therefore, the learned trial judge found that the accused had custody and control of the said drugs. As for the element of knowledge, the learned trial

judge accepted the evidence of the raiding officer, Inspector Wan Mohd Ismail bin Wan Aziz (PW7) that the accused had uttered the words 'Ada syabu di dalam plastik krim di sebelah kerusi bahagian penumpang' in response to PW7's question. The learned trial judge did not invoke the presumption under s 37(d) of the Act.

[10] As for the element of trafficking, the learned trial judge invoked the presumption of trafficking under s 37(da)(xvi) of the Act as the amount of the drugs involved was more than the minimum weight of 50g as provided under the law.

[11] After being satisfied that all the elements of the first charge had been proven and after finding that the evidence adduced by the prosecution's witnesses are credible and reliable, the learned trial judge held that the prosecution had established a prima facie case against the accused on the first charge. Thus, the accused was called upon to enter his defence.

THE DEFENCE

[12] The accused elected to give evidence under oath. The accused was the sole witness for the defence. The accused defence had been summarised by the learned trial judge in his judgment at pp 34–35 of the appeal record Vol 1, as follows:

> [56] The Accused in his defence contended that at the material time he was about to deliver a wallet to one Aloysius, who had purchased the same from the Accused's wife. According to the Accused, the said wallet was wrapped and kept/placed inside the same plastic bag found in the front passenger's seat of the car.
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> [57] The Accused claimed that he did not check the actual content of the plastic bag and told the court that he trusted his wife. He also said he was helping his wife in her business by delivering their orders. In short the Accused was denying any knowledge of the presence of the drug found in the said car dan contended that he was merely delivering the purported wallet to a man called Aloysius.

[13] After considering the accused's version, the learned trial judge found that the accused had not succeeded in creating a reasonable doubt in the prosecution's case. The learned trial judge further held that the accused had failed to rebut the presumption of trafficking under s 37(da)(xvi) of the Act invoked against him, on the balance of probabilities.

[14] The learned trial judge rejected the accused's defence of an innocent carrier holding that the accused's conduct was deliberate in shutting his eyes to the obvious. The learned trial judge further commented in his judgment that the accused chose to act blindly. There was no evidence to suggest that the accused had been deprived of an opportunity to examine the contents of the

cream plastic bag. Hence, the defence of innocent carrier is not applicable to the accused as he had only showed that he was an ignorance simpliciter.

[15] The accused was thus convicted and sentenced to death on the first charge as proffered. Hence the appeal before us.

THE APPEAL

[16] Before us learned counsel for the accused canvassed four main issues, namely:

(a) whether the accused was under arrest when he uttered the words amounting to an admission of knowledge about the impugned drugs in the said Kancil car;

(b) whether a statutory caution had been given to the accused;

(c) failure of the learned trial judge to consider the evidence of PW8 which corroborated the defence of the accused; and

(d) failure by the prosecution to call and to produce the wife of the accused.

OUR DELIBERATION AND DECISION

[17] The crux of learned counsel's complaint was mainly centered on the learned trial judge's findings of fact and on the evaluation of the evidence of the prosecution's case. Learned counsel argued that had the learned trial judge properly and adequately consider the evidence of the prosecution's witnesses, the learned trial judge would have come to a different finding in that the prosecution's case was short of proving a prime facie case and the accused's defence should not have been called by the learned trial judge. All the four issues raised by the learned counsel related to the learned trial judge's findings on the prima facie case.

[18] We deal with the first and second issue raised by learned counsel together as the two were inter-related. On the issue of arrest, learned counsel argued that the learned trial judge erred in making a finding that there was no arrest made by the police and that PW7 was merely making an inquiry towards the accused in which it was alleged that the accused made a statement saying there was syabu. Learned counsel submitted that the alleged statement made by the accused should have not been admitted and considered by the learned trial judge as it was made after his arrest and before any caution was administered.

[19] We agreed with learned counsel. We are of the considered opinion that there is merit in the learned counsel's complaint. As we alluded to earlier, the learned trial judge relied on the answer given by the accused that 'Ada syabu di

dalam plastik krim di sebelah kerusi bahagian penumpang' as the sole basis for the learned trial judge to form his finding that the accused had the prerequisite knowledge. The learned trial judge also relied on direct evidence to fasten the element of knowledge and possession of the impugned drugs against the accused. The relevant findings of the learned trial judge on this issue can be seen at pp 17–18 of the appeal record Vol 1, as follows:

> [17] From the above evidence, it is not disputed that the Accused was alone in the Kancil car at the time of the arrest. Nobody was seen leaving or entering the Kancil car throughout observation by PW7 before the police team approached the Kancil car. In fact, immediately after PW7 asked the Accused whether there is any illegal substance (*barang salah*) the Accused answered that there is 'syabu' in the cream plastic packet. This answer implies that the Accused is having both the custody and control of the said drug at the time of the arrest.
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> [18] With regard to the ownership of the car, it is proven through Lai Pui Hiung (PW11) that the Kancil car was sold to the Accused in 2014. Prior to the sale, PW11 bought the Kancil car from Lai Pui Tzen (PW10) but the transfer of the car was not registered on the registration card of the vehicle. PW11 also confirmed that after the sale to the Accused, he (PW11) did not use the said car.
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> [19] Base on the above facts, it is safe to conclude that the Accused has both the control and custody of the said drug found in the front passenger's seat of the Kancil car.

[20] The learned trial judge did discuss the issue as to whether the accused was under arrest when he uttered the first statement that there is syabu in the car. The learned trial judge made a correct finding of fact that the first statement about syabu in the car by the accused was obviously without any prior caution administered by PW7. The learned trial judge referred *Jayaraman & Ors v Public Prosecutors* [1982] 2 MLJ 306; [1982] CLJ 464; [1982] CLJ Rep 130 for the meaning of arrest before deciding that the accused was not under arrest at the time when he uttered the first statement. Instead, the learned trial judge of the view that the police (PW7) was merely making an inquiry immediately after the accused was stopped by the police. Learned trial judge further relied on *Public Prosecutor v Lim Hock Boon* [2009] 3 MLJ 604; [2009] 3 CLJ 430 where Nik Hashim FCJ opined that the need to administer the caution under s 37A (now 37B(1)(b) of the Act only arises after actual arrest and not constructive arrest.

[21] Learned counsel argued that the accused was actually under arrest when he uttered the impugned remark that there was syabu in the said Kancil car. Learned counsel's submission was based on the facts and circumstances prevailing in this case to show that the accused was actually under arrest when the so called inquiry was done by PW7. We had the opportunity to peruse the evidence from the appeal records. It was the evidence of Detective Sergeant Major Abdul Gani bin Behram (PW2), a member of the raiding party which

stated that when they ambushed the accused's car, PW2 had used his car to block the accused's car before PW2 with three other members of the raiding team alighted from PW2's car and surrounded the accused's car. Corporal Amiran, a member of the team then went to the driver's side and took the accused's car key off from the ignition and restrained the accused. The evidence of PW2 at p 98 of the appeal record Vol 2 as follows:

> Q: Boleh ceritakan lebih lanjut apakah yang berlaku setelah kamu memandu kereta kamu menghalang kereta yang dipandu oleh saspek/tertuduh?
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> A: Apabila kami sampai dan menghalang kereta suspek, saya dan Korp Amiran bersama Korp Azlan dan Korp Elizabeth turun dari kereta saya sendiri, dan pada masa itu, Korp Amiran pergi ke tempat pemandu saspek (kereta Sang Kancil — right hand drive) untuk menahan saspek dan mengambil kunci kereta, manakala pada masa itu, tertuduh berada di dalam kereta duduk di tempat pemandu, dan saya berada di sebelah kiri kenderaan suspek ...

[22] We agreed with the learned counsel's submission that the accused had been restrained and that force was used to prevent the accused from driving away with the said Kancil car. The conducts by the raiding team headed by PW7, to us, clearly show that the arrest occurred at that time. We observed that the word used was 'menahan' and the word used by the learned deputy public prosecutor in his question 'menghalang' denotes a positive act which amounted to an arrest. This is consistent with the meaning of arrest enunciated by Suffian LP in *Jayaraman & Ors*, where His Lordship opined:

> An arrest occurs when the police states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will if necessary, use force to prevent the individual from going where he may want to go. It does not occur when he stops an individual to make inquiries.

[23] We agreed with learned counsel's submission that the learned trial judge had misdirected in fact and law when His Lordship made a finding that no arrest had been made at the time when the accused uttered the first statement to the effect that there was syabu inside his car. Therefore, the learned trial judge erred when His Lordship relied on the first statement to fasten knowledge of the impugned drugs to the accused person. This error and misdirection had occasioned a substantial miscarriage of justice to the accused person which warranted an appellate intervention.

[24] On the second issue which related to an admission by the accused which was given after a caution had been administered by PW7, learned counsel argued that learned trial judge erred when His Lordship relied on the second statement by the accused that there was drug in the car on the ground that the second statement had been withdrawn by the learned deputy in the court below and the record regarding the same had been consequently expunged.

[25] The prosecution in the court below produced the police report (P43) made by PW7 to prove that the accused had knowledge of the drugs in the car. In P43, PW7 stated that after administering the caution under s 37A(1)(b) of the Act (now s 37B(1)(b)) he asked the accused what was inside the cream package found inside the accused's car and the answer given by the accused was 'syabu'. The prosecution had intended to introduce this evidence against the accused to prove knowledge on the part of the accused about the impugned drugs. This was strongly rejected by the learned defence counsel. The learned deputy at the same time introduced the same piece of evidence through the oral evidence of PW7 facing the same objection from the learned defence counsel. This indicated that a voir dire have to be convened by the learned trial judge before the second statement, which amounted to an admission, to be accepted as evidence of the prosecution.

[26] The relevant part of PW7's oral evidence on this point can be found at p 208 of the appeal record Vol 2(1) which we produced below:

> Q: Tadi kamu katakan kamu telah mengenalkan diri sebagai polis. Apa yang telah kamu lakukan selepas itu?
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> A: Saya bertanya kepada lelaki tersebut samada terdapat barang salah. Kemudian lelaki tersebut menjawab 'ada syabu di dalam plastik warna krim di sebelah kerusi bahagian penumpang'. Kemudian sebelum melakukan pemeriksaan terhadap plastik krim tersebut saya telah memberikan kata-kata amaran di bawah Seksyen 37A(1)(b) ADB 1992. *'Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu. Dan kamu adalah diwajibkan menjawab atau menyatakan apa-apa tetapi apa jua yang kamu nyatakan boleh dijadikan sebagai keterangan'. Setelah difahami oleh lelaki tersebut saya tanyakan kepada lelaki tersebut apa yang ada dalam plastik krim tersebut. Kemudian lelaki tersebut menjawab ada dadah syabu ...* (Emphasis added.)

[27] We understand the objection taken by learned counsel in the court below not only on the issue of voluntariness of the statement but as well as the caution itself administered by PW7 was not in the proper words as provided under the relevant section and further it was never explained to the accused the meaning of the caution. In the caution administered by PW7, it was mentioned that 'Kamu adalah diwajibkan menjawab atau menyatakan ...' which is mandatory for the accused to give an answer to any question put to him by PW7. This is not the law. The exact words of caution used under s 37A(1)(b) of the Act were in following words:

> (b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect —
>
> > It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, maybe given in evidence:

Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by giving reason of no such caution having been given if it has been given as soon as possible.

[28] We did not find any evidence in the appeal records that PW7 had in fact mentioned and explained the exact words or words to the like effect to the accused in this case before us. The proper administration of the statutory caution is a prerequisite to the admissibility of any confession or an admission.

[29] In *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481, Augustine Paul JCA (as he then was) had the occasioned to decide on the same issue as follows:

... it must be observed that the need to administer the caution as required by s 113(1)(a)(ii) is an explicit endorsement and preservation of the privilege against self-incrimination as it gives the accused the option to remain silent. It is perhaps to ensure that this privilege is not diluted in any way that s 113(1)(a)(ii) provides that a statement made by a person after his arrest shall not be admissible in evidence' ... unless the court is satisfied that a caution was administered to him in the following words or words to the like effect ...' it can therefore be seen that the satisfaction of the court on the administration of the caution goes to the very root of the admissibility of a statement that had been made. What requires consideration is whether a mere reading of the caution will amount to the court being 'satisfied' that it had been administered.

[30] We found that the learned trial judge had fallen into error when His Lordship proceeded to consider and relied on the accused's admission to fasten the element of knowledge when the evidence regarding the admission had been expunged at the request of the learned deputy in the court below. These could be seen from the appeal record Vol 2(1) at pp 229–230, as follows:

Q: Semalam kamu beritahu Mahkamah bahawa setelah membuat pemeriksaan terhadap kereta kancil yang dipandu oleh tertuduh kamu ada memberi kata-kata amaran betul?

A: Ya.

Q: Jika saya tunjukkan kata-kata amaran, boleh kamu camkan?

A: Boleh.

DPP: Section 37A(1)(b) still enforce during the crime.

DC: If the statement were to be tendered to the witness and to the court the Defence will have to apply for the trial within the trial. This is the requirement of the law. So I am seeking Your Lordship direction.

Pray to stand down to this afternoon.

DPP: I agree with my learned friend.

DC: There are 2 caution statement alleged made by the police. We will be challenging.

Court: Section 37A(1)(b) has been re numbered as Section 37B(1) with effect from 15.02.2014. Hence caution statement is still admissible subject to the requirements/conditions stated therein. If prosecution wish to tender the statement a trial within a trial is necessary. Therefore court adjourn to 2.00 p.m.

11.25 a.m

Court resume @ 2.15 P.M.

Parties as before.

DPP: Prosecution decided not to tender the caution statement.

DC: I will not proceed with the trial within trial.

DPP: I would like to call PW7 for continuation of Examination in Chief.

[31] It is irrefragable from the notes of evidence that the learned deputy had in fact withdrawn their effort to put in the admission by the accused as part of their evidence. This was overlooked by the learned trial judge.

[32] The learned trial judge proceeded to hold that the statutory caution had been properly administered by PW7 and the statement given by the accused was admissible. Based on that findings, the learned trial judge ruled that the accused had the prerequisite knowledge and thus had possession of the impugned drugs. The findings and ruling of the learned trial judge can be found from pp 22–25 of the appeal record Vol 1 which we produce below:

[31] The next issue to be determined is whether the Accused has the knowledge of the drugs found in the said cream plastic bag.

[32] At this stage it is pertinent to state that the first statement made by the Accused to PW7 also indicate that he has the knowledge the nature of the said drug in the cream plastic bag. Be that as it may, after the accused made the first statement PW7 proceeds to administer the caution under Section 37B(1)(b). After ascertaining that the Accused understood the caution PW7 asked him what is the content of the cream plastic bag to which the Accused replied there is syabu.

[33] Section 37B(1)(b) of the Act provides that any statement made by the Accused after his arrest is admissible if the court is satisfied that the caution is administered to him. This section provides:

> (b) In the case of a statement made by such person after his arrest, unless the court is satisfied that the caution was administered to him in the following words or words to the like effect:
>
> It is my duty to warn you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence. Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having be given if it has been given as soon as possible.

[34] I have reproduced the cautionary words administered by PW7 to the Accused in paragraph 15 above. It would appear that PW7 did not administer the exact

cautionary words under paragraph (b). At the later part of the caution PW7 said:

> ... tetapi apa jua yang kamu nyatakan boleh dijadilkan keterangan ...

It is obvious that PW7 had omitted to add 'Samada dalam menjawab apa-apa soalan atau tidak ...' in his caution.

[35] In my opinion such omission is not fatal because under paragraph (b) the court must be satisfied that the caution was administered following the words in that paragraph or 'words to the like effect'. (Emphasis added). In my opinion the words 'apa-apa yang kamu nyatakan' would mean anything said by the Accused be it in answer to a question or not. It is wide enough to cover the cautionary words under paragraph (b). In my opinion the caution administered by PW7 carries the same meaning as the statutory caution under paragraph (b). Therefore I rule that the statutory caution had been properly administered by PW7 and the statement given by the Accused is admissible.

[36] After the Accused said the cream plastic bag contain syabu, PW7 checked the contents of same and found that it contain clear crystallized substance which was later confirmed to be Methamphetamine, the subject matter of the present case.

[37] Further the fact that the Accused pleaded to PW7 to be given another chance and promise to cooperate with the police show that he know the content of the cream plastic bag. He has the knowledge that he was carrying drug in the said plastic bag found on the front passenger seat of the said Kancil. In my opinion, the prosecution has adduced credible direct evidence that the Accused has the knowledge of the nature of the drug.

[38] Based on the aforesaid reasons, I am satisfied that the prosecution has proven that the Accused was in possession of the said drug at the material time and I so rule.

[33] From the above, it is clear that the findings of the learned trial judge was perverse and warrants an appellate intervention.

[34] In regard the third ground of appeal, learned counsel's complaint was that the learned trial judge had failed to take into consideration the evidence of PW8, Lau Fung Kwan @ Lau Mui who is the grandmother of the accused who had in her evidence corroborated the accused's evidence that he is helping his wife to deliver an order. The evidence of PW8 which corroborated the accused version which had not been considered by the learned trial judge can be found at pp 285–286 of the appeal record Vol 2(1) as follows:

Q: Ho Tze Kean ada memberitahu kamu sebelum dia beredar dari rumah pada hari tersebut bahawa dia juga keluar untuk membantu isterinya Ann menghantar barang pesanan daripada pelanggan Ann dalam perniagaannya yang menjual beg duit dan pakaian. Setuju?

A: Ada. Dia bercakap 'Nenek, saya tolong Ann hantar barang kepada kawannya'.

[35] We have perused the learned judge's grounds of judgment and we agreed that His Lordship did not at all consider the evidence of PW8 which

supported the accused's defence. The learned judge commented that it is highly improbable that the accused's wife would have framed her husband into the commission of an offence. This is not the defence's version. The defence's version was that the accused was just helping the wife in her business. Without considering the evidence given by PW8 which corroborated the accused's evidence coupled with the fact that the accused's wife had gone into hiding, the learned trial judge branded the accused as an ignorance simpliciter for not examining the contents of the cream plastic bag.

[36] In *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206; [2007] 2 CLJ 509 this court had decided as follows:

> Now, among the general rules that govern judicial appreciation of evidence in both civil and criminal causes in the adversarial system of justice *there is one fundamental importance. It is that a party is bound by the evidence of witnesses whom he calls in proof of his case*. See *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371. (Emphasis added.)

[37] The piece of evidence given by PW8 which supported the defence's version was not challenged and not even rebutted by the prosecution. Yet, we found that this piece of evidence was not considered by the learned trial judge when His Lordship evaluated the defence case.

[38] In regard to the final ground of appeal, learned counsel's complaint was on the failure of the learned trial judge to invoke adverse inference under s 114(g) of the Evidence Act 1950 for failure on the part of the prosecution to call and produce the accused's wife, Virgie Tesara Calsena (Ann) to court to give evidence. From the appeal records it shows that there was an attempt by the prosecution to introduce as evidence Ann's statements under s 112 of the Criminal Procedure Code but was rejected by the learned trial judge on the ground that precondition under s 32(1) of the Evidence Act 1950 had not been satisfied. The ruling made by the learned trial judge can be found at p 355 of the appeal record Vol 2(1) as follows:

> Court: Before Section 32 can be invoked, it must be shown that the requirement under section 32 ie the maker is dead or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense. In this case besides the evidence of PW11 that he has tried to locate the witness through his query with accused's grandmother, there is no evidence to show that sufficient attempts have been made. At the very least the prosecution could check with the Immigration department on the movement of the witness. Hence I am of the opinion that the requirement under section 32(1) have not been fulfilled and I rule that it is inadmissible.

[39] It is trite that when witnesses are not called or produced in court, the court would be obliged to invoke the adverse inference under s 114(g). Only if the witness is a material witness which forms part of the narrative of the

prosecution's case and that there was evidence of suppression or withholding of evidence only then that the adverse inference under s 114(g) of the Evidence Act 1950 can be invoked against the prosecution (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492).

[40] We have the opportunity to peruse the appeal records to determine what role played by Ann in this case. It was at all time the defence case that the appellant was asked by Ann to help her to send her order. This fact was also confirmed by PW8 as we alluded to earlier in our judgment. This evidence was not challenged and came from the prosecution own witness. What can safely be deduced from here is that the police had the prior knowledge for such information. We are of the considered view that Ann is an important witness which form part of the narrative of the prosecution's case. It is trite that the failure to call or offer the material witness would trigger the adverse inference under s 114(g) of the Evidence Act 1950, against the prosecution.

[41] From the records, we observed that the police had recorded a statement under s 112 of the CPC from Ann. This can be seen from the evidence of PW11 at p 338 of the appeal record Vol 2(1) as follows:

> Q: Adakah kamu dalam siasatan kamu merakam keterangan seorang saksi bernama Virgie Tesara Calsena semasa dalam siasatan kamu?
>
> A: Ada.
>
> Q: Siapakah saksi yang bernama Virgie Tesara Calsena?
>
> A: Saksi tersebut adalah isteri kepada tertuduh yang tinggal bersama-sama di rumah no. E60 Jambatan 6 Perumahan murah Sim Sim Sandakan.
>
> Q: Adakah kamu ingat bila tarikh rakaman percakapan dilakukan?
>
> A: Saya tidak ingat tarikh.
>
> Q: Jika saya tunjukkan rakaman percakapan boleh kamu camkan?
>
> A: Boleh.
>
> DC: I object to the introduction of this alleged 112 statement of the named person.

[42] Naturally the defence objected to the prosecution application to introduce the alleged 112 statement. Their main reason was that there was no evidence that sufficient efforts were made to ensure the attendance of Ann though she was an important witness. The evidence showed that PW11 had only attempted service of the subpoena on Ann with only a single visit to her residence at No E60 Jambatan 6, Rumah Murah Sim-Sim, Batu 3, Sandakan. There was no other efforts undertaken by PW11. We agreed that the efforts taken by PW11 were not sufficient to satisfy preconditions as provided under s 32(1) of the Evidence Act 1950. We observed the efforts taken by PW11 at p 341 of the appeal record Vol 2(1) as follows:

Q: Boleh kamu nyatakan apakah usaha yang kamu jalankan untuk mengesan saksi bernama Virgie Tesara Calsena untuk hadir di Mahkamah untuk menjadi saksi kepada kes ini?

A: Saya pernah apply subpoena untuk penama saksi tersebut namun saya masih gagal untuk mengesan dan menyerahkan subpoena. Setelah saya bersama anggota saya pernah pergi ke rumah tempat tinggal saksi tersebut di no. E60 Jambatan 6 Rumah Murah Sim-Sim Batu 3 Sandakan tetapi setelah dimaklumkan oleh nenek Ho Tze Kean sendiri mengatakan saksi tersebut telah melarikan diri dari rumah tersebut.

[43] We are of the considered view that the measures undertaken by the police were woefully inadequate. For the failure by the prosecution to call Ann or to successfully put in her 112 statement, the prosecution had failed to exclude the possibility of access by others to the said impugned drugs and to answer the question as to who was the real trafficker. The only evidence against the appellant was merely of close proximity to the drugs in the Kancil car. Therefore, the failure of the prosecution to call Ann had created a gap in the prosecution's case and would amount to a suppression of evidence hence attract the invocation of an adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution. It is our judgment that learned trial judge erred when His Lordship failed to do so in the instant appeal.

CONCLUSION

[44] In the upshot, we found merits in the appeal. We were satisfied that the conviction of the accused was not safe. Therefore, the appeal is allowed. We set aside the conviction and sentence of the High Court.

Appeal allowed.

Reported by Afiq Mohamad Noor